FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 1358

McALLISTER LIGHTERAGE LINE, INC., as claimant of the Tug "G. M. McALLISTER,"

Petitioner,

against

P. DOUGHERTY COMPANY, as owner of the Barge "HARFORD,"

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
Proctor for Respondent.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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POINT I

The decisions of both Courts follow well established law.

Petitioner's argument disregards the testimony which both the District Court and the Circuit Court of Appeals recognized, that the order to petitioner to tow the *Harford* to anchorage was understood by petitioner to be an order to place the barge in a safe berth. Benze, petitioner's employee, who took the order, testified (R. 75):*

> "Q. And in all your orders to take barges to anchorage like Red Hook, Port Reading, Amboy, or whatever it might be, you understand that means to a safe anchorage, don't you? A. That is right, sir."

* References are to pages of the record.

The Circuit Court of Appeals stated the "orders were to put her (the *Harford*) in a *safe* berth" (R. 117). The District Court found that respondent gave petitioner an order to tow the *Harford* to "a safe anchorage" in the vicinity of Port Reading, New Jersey (R. 97).

Recognizing that a tug is not an insurer of the safety of its tow, but is liable only for negligence, the Circuit Court of Appeals said (R. 115-116):

> "In selecting a berth for her tow a tug is chargeable with 'such information as is current in the calling.' Waldie v. Steers Sand & Gravel Corp., 151 F. 2d 129, 131 (C. C. A. 2). Common knowledge ought certainly to include all that the charts of Geodetic Survey disclose about the bottom. These are available to all, and before undertaking a towing job either the tug's master must inform himself from them, or its owner must and instruct the master. In the case at bar it is true, the owner of the barge directed that she be left at the anchorage grounds; he did not, however, designate the precise place where she was to be anchored but left the selection of a safe berth to the appellant.
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> "* * * The testimony that other barges of equal size had previously been safely anchored within the anchorage grounds justifies the inference that the *McAllister* either chose a poor place for anchoring or an improper method of anchoring the barge; in either case she gave the *Harford* a foul berth and was properly held liable for ***negligence*** in so doing." (Italics supplied.)

The District Court stated in its second conclusion of law (R. 100):

> "The negligence of the tug *G. M. McAllister* in failing to place the barge *Harford* at a safe anchorage point was the sole and proximate cause of the damage to the barge *Harford*."

Thus it is obvious that, contrary to petitioner's assertion, the case does not involve the question of law whether a tug is an insurer. It involves only a question whether it was negligent for a tug to anchor a barge where under reasonably to be foreseen conditions of wind and tide, within two and a half hours after arrival the barge grounded and was damaged (District Court's conclusion No. 1, R. 99—C. C. A. Opinion, R. 115).

To accept petitioner's contention that a tug is bound only to bring the vessel to a point safe at the moment of arrival would, we submit, relieve her of any duty of reasonable care and exonerate her from liability for mooring a vessel at a point known to be dangerous at low tide although safe at high water. Such a ruling would constitute a radical change in long existing law.

O'Boyle v. *Cornell Steamboat Co.*, 298 Fed. 95;
The B B No. 21, 54 F. (2d) 532;
The Bleakley No. 76, 54 F. (2d) 530.

The record does not support petitioner's assertion that the *Harford* was moored in the "best available berth," "in the deepest water and widest berth within the anchorage." We have already quoted the statement of the Circuit Court of Appeals that the evidence of safe use of the anchorage ground by vessels of equal size "justifies the inference" that the tug chose a poor berth or an improper method of anchoring.

All of petitioner's arguments were considered and answered in the decisions of the Circuit and the District Courts. No new or important questions of law are involved.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Proctor for Respondent.